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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ELVIN LIKE et al.,

Plaintiffs and Appellants,

v.

U.S.A. CAB LTD. et al.,

Defendants and Respondents.

D052240

(Super. Ct. No. 37-2007-00068385-
CU-OE-CTL)

APPEAL from an order of the Superior Court of San Diego County, John S.

Meyer, Judge. Affirmed.

Three former employees (plaintiffs¹) brought a class action against U.S.A. Cab Ltd. and its individual owners/operators (defendants), alleging wage and hour and other labor law violations. Defendants demurred to the class allegations on the ground that an identical class action (with different named plaintiffs) was pending before another judge

¹ Plaintiffs are Elvin Like, Abdeladim Jawad, and Jama Yacub.

of the San Diego County Superior Court. Defendants alternatively requested the court to stay plaintiffs' class and individual claims pending the final resolution of the first action.

In response, plaintiffs agreed to remove the class allegations, but opposed the stay request. Based on plaintiffs' concessions, the court sustained the demurrer without leave to amend on the class allegations. But the court refused defendants' request that it stay the individual claims, reasoning that if plaintiffs wished to continue to litigate their individual claims, they had the right to do so. The court thus entered an order dismissing the class allegations, but denying defendants' request for a stay.

Plaintiffs appeal. In their opening brief, plaintiffs contend the court erred in dismissing the class allegations without providing them with an opportunity to amend. But in their reply brief, they request only that we remand and direct the trial court to modify its order by adding that the order is "without prejudice to [plaintiffs'] rights to later participate in the [prior] action, should a class be certified in that action."

The argument is without merit. Plaintiffs waived their right to seek this modification by failing to make the request below. Moreover, the proposed modification concerns an issue that was not before the trial court. To the extent plaintiffs are challenging the court's comments at the hearing on defendants' demurrer, this challenge is not proper because plaintiffs did not object to the court's comments and the comments were never incorporated in the court's order. Further, the court's comments were proper and appropriate. The order is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

In June 2007, five former U.S.A. Cab taxi drivers (the three plaintiffs here and two others) brought a class action complaint against defendants, alleging defendants improperly characterized them as independent contractors, and defendants violated laws by requiring taxi drivers to sign mandatory lease agreements, failing to pay minimum wages, and failing to provide meal and rest breaks. The case was assigned to Superior Court Judge John Meyer.

One month later, defendants filed a demurrer to plaintiffs' class allegations, arguing the class allegations must be dismissed or the action abated because another lawsuit was pending against them in San Diego Superior Court containing identical class allegations and filed by the same law firm (referred to here as the "*Ali* litigation").² Defendants requested the court take judicial notice of documents showing the *Ali* litigation was pending before Superior Court Judge Kevin Enright, and Judge Enright had issued a tentative ruling denying the *Ali* plaintiffs' motion for class certification. Defendants argued the matter should be stayed under the exclusive concurrent jurisdiction doctrine.

Shortly after, one of the five plaintiffs joined the *Ali* litigation as a named plaintiff, and one plaintiff dismissed out of the action. The remaining three plaintiffs then filed an amended complaint, reasserting the same class allegations.

² Defendants also sought to strike the allegations against the individual defendants. However, because this portion of the demurrer is not at issue in this appeal, we do not further discuss the issue.

Defendants again filed a demurrer to the class allegations. Defendants argued the class allegations were barred by the collateral estoppel doctrine because Judge Enright had issued a final ruling denying the *Ali* plaintiffs' motion for class certification based on his finding that individual issues predominate. (See *Alvarez v. May Department Stores Co.* (2006) 143 Cal.App.4th 1223, 1233-1240.) Defendants alternatively argued the court should stay the action while the class certification issue in the *Ali* litigation was pending on appeal.

In response, plaintiffs conceded their class allegations should be dismissed based on the order in the *Ali* litigation. Plaintiffs stated they would "amend their complaint to remove the [c]lass action allegations" and "acknowledge[d] that the issue of Class certification should not be re-litigated at the trial court level." However, plaintiffs urged the court to reject defendants' request that the court stay the action on their individual claims. Plaintiffs argued that they "*are entitled to their day in court, and abatement of their individual claims would be manifestly unjust.*" (Italics added.) Plaintiffs stated that "defendants cite no authority that would preclude injured plaintiffs from bringing their own individual actions following a prior court's order denying another similarly situated plaintiff's motion for class certification. . . ."

In reply, defendants reiterated they did not dispute that plaintiffs should be allowed to assert their individual claims, but requested the court to stay the action until after the termination of the appeal in the *Ali* litigation. Defendants stated that plaintiffs "should not be allowed to unduly burden the courts with two separate actions until a final and dispositive determination has been made with regard to the class certification issue."

The court issued a tentative ruling granting defendants' demurrer to the class allegations, but denying defendants' request for a stay of the litigation on plaintiffs' individual claims. With respect to the class allegations, the court stated, "[i]t is undisputed that the class allegations and related causes of action are virtually identical to those asserted in [the *Ali* litigation]" and "[p]laintiffs agree to remove the class action allegations in this action" On the stay issue, the court found defendants' request for a stay of plaintiffs' individual claims "is not persuasive in light of defendants' position that the plaintiffs' individual claims cannot be certified as class claims."

At the hearing on the motion, defendants' counsel again urged the court to stay the litigation "in the interest of judicial economy," emphasizing that if the "Court of Appeal[] decides . . . [the *Ali* litigation] should proceed as a class action[,] . . . [¶] . . . [¶] [t]here's no need for this case." When the court asked plaintiffs' counsel for his position on this issue, the following colloquy occurred:

"[Plaintiffs' counsel]: Your honor, class action or not, plaintiffs always have the right to bring their own individual claim and they always have their right to a day in court.

The Court: . . . I agree.

[Plaintiffs' Counsel]: Aside, I don't want to harp on the fact but they're kind of blowing hot and cold in here on one hand saying—

The Court: I'm not going to stay the case.

[Plaintiff's Counsel]: Then I don't have anything further.

The Court: [Plaintiffs have] the right to pursue the case, as individuals.

[Defendants' counsel]: Your Honor, they certainly do and our position is if the appeal is dismissed, all the individual claims can proceed. But what we have is an action here that plaintiffs rushed to file and there may be no need for it because if the Court of Appeal reverses it, they have their claim in that case. So we're . . . wasting judicial time and cost to the parties for an action that may not be necessary. And we continue to believe the action should not proceed as a class action, but plaintiffs' counsel has appealed that issue. And there's a duplication here of effort by the courts and the parties that may be needless.

The Court: I'm not going to stay it. So—

[Plaintiffs' counsel]: Your Honor, one point of clarification on the tentative, the order sustaining the demurrer to the class allegations without leave to amend, *we have no problem removing [the class allegations] from the complaint, we're not going to bring another motion for class certification or litigate that here again at trial court level.* I just want to clarify for the record whether that is without prejudice to my clients' rights to participate in a class action should it ever come back.

[Defendants' counsel]: That's exactly the problem.

[¶] . . . [¶]

The Court: Wait a minute. [Plaintiffs are] pursuing individual claims.

[Plaintiffs' counsel]: Okay, if that's—I understand the position, that's fine. I just wanted to clarify.

The Court: This is their individual claims.

[Plaintiffs' counsel]: That's right.

The Court: All right. [¶] *[Plaintiffs] can't have it both ways.*

[Plaintiffs' counsel]: *Very good point.*

[Defendants' counsel]: Your Honor, excuse me, . . . they might see it on the one hand they can pursue this, might even get some sort of relief, take it to trial. On the other hand, they might be designated as members of that class and get relief there.

The Court: I think [plaintiffs] pretty much opted out of that class.

[Defendants' counsel]: We don't know that. [Plaintiffs] have declarations they purport to be members of the *[Ali]* class. That's why I asked the court to just put a little kibosh on this for a few minutes here and see what the Court of Appeal does.

The Court: *I'm not going to stay the case, but you [plaintiffs] understand you've got a certain risk.*

[Plaintiffs' counsel]: *Absolutely, Your Honor. It's a point well taken and I'll submit on the tentative in that regard.*

The Court: You've got an interesting representation issue perhaps. But that's your problem. [¶] So I'm going to—the tentative will be the order." (Italics added.)

The court thereafter entered an order sustaining the demurrer to the class allegations without leave to amend, and denying defendants' request to abate the remaining individual claims.

DISCUSSION

In their opening appellate brief, plaintiffs contend the court erred in sustaining the demurrer *without leave to amend*. But plaintiffs do not support this contention with any relevant legal or factual authority. "When an issue is unsupported by pertinent or

cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.) Additionally, plaintiffs waived this argument because they specifically agreed below to dismiss their class action allegations and made clear they did not wish to litigate the class issues in this second action. A party waives the right to challenge a court's ruling if the party "acquiesced in and contributed to" the alleged erroneous ruling. (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 742-743.)

In their reply brief, plaintiffs take a different position. Plaintiffs now indicate they are no longer challenging the court's determination to grant the demurrer without leave to amend on the class allegations. They state instead that they seek a reversal only in the form of a direction to the trial court to modify its order to add that the order is issued "without prejudice to [plaintiffs'] rights to later participate in the *Ali* action, should a class be certified in that action."

We reject this request. A party cannot prevail on an issue in the appellate court if the party did not raise the issue in the court below. (*Imperial Bank v. Pim Electric, Inc.* (1995) 33 Cal.App.4th 540, 546.) Plaintiffs did not bring a motion to establish their future rights to qualify as a class member in the *Ali* litigation. Nor would such a motion have been proper because the court had no jurisdiction to rule on the scope of the putative class in another action, particularly when that action was pending on appeal. Because the issue of plaintiffs' rights to join the *Ali* class action was not before the trial court and was not the subject of the challenged order, plaintiffs' contention is not cognizable on appeal.

In their appellate briefs, plaintiffs nonetheless express concern with the trial court's comments at the hearing on defendants' demurrer that by opposing a stay of their individual claims, plaintiffs may have opted out of the *Ali* class (if the *Ali* order is reversed and the class becomes certified). However, plaintiffs did not assert an objection to these comments below. Instead, plaintiffs' counsel responded only that "I understand the position, that's fine" and "It's a point well taken." An appellate court will not consider challenges to a court's actions where the appellant invited the error and/or failed to assert an objection below. (*People v. Williams* (1999) 20 Cal.4th 119, 136.)

Moreover, even if plaintiffs could now challenge the court's comments pertaining to their rights in the *Ali* litigation, this challenge would fail. It is undisputed that plaintiffs are within the class sought to be certified by the *Ali* plaintiffs. As acknowledged by defendants below, if plaintiffs had agreed to stay their individual actions, they would be entitled to opt into that class if the appellate court reverses Judge Enright's order. But if plaintiffs continue to litigate their individual claims to judgment, they would not be entitled to thereafter join the class because their own judgment would obviously bar their claims under the res judicata doctrine. The issue of whether they would be entitled to join the class if they engaged in some litigation without reaching a final judgment is not before this court and was not before the trial court. The trial court merely made a correct observation about the risk that plaintiffs were taking in opposing defendants' request for an abatement of the action pending the outcome of the *Ali* appeal. The comments—made in response to plaintiffs' "request for clarification"—were proper.

DISPOSITION

Order affirmed. Appellants to pay respondents' costs on appeal.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.